United States Court of Appeals

for the Second Circuit

REPLY BRIEF

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74-2702

To be argued by
Charles Sutton, Esq.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2702

UNITED STATES OF AMERICA,

Appellee,

—against—

PATRICK HENRY VALCARCEL,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANT'S
SUPPLEMENTAL AND REPLY BRIEF

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Appellee,

v.

PATRICK HENRY VALCARCEL,

Defendant-Appellant.

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STATEMENT

This supplemental and reply brief is submitted in support of appellant's appeal to this Court from the judgment of conviction dated and entered June 25, 1974 before Chief Judge Jacob Mishler, United States District Court, Eastern District of New York.

POINT I

The inference charge was barred

It appears that the Government has overlooked the meaning of United States v. Barnes, 412 U.S. 837 (1973) cited in defendant-appellant's brief. The inference charge should not have been given at all. Under the facts in this case it was arbitrary and barred.

United States v. Barnes,
412 U.S. 837 (1973);

Bollenbach v. United States,
326 U.S. 607 (1946);

Tot v. United States,
319 U.S. 463 (1943).

The obvious premise and essential condition precedent to the giving of any inference charge based upon "possession of recently stolen property" is that the property possessed must in fact be "recently stolen".

United States v. Barnes,
412 U.S. 837, 843, 845 (1972).

It is fair to state that in those cases where the inference charge from possession of recently stolen property was given, the defendant either conceded that the property he possessed was recently stolen, or it was so proved beyond a reasonable doubt, or it was unchallenged.

9 Wigmore, Evidence, Section 2513

Since that essential element was not proved, the next condition precedent to the giving of the charge, that is, whether the "explanation" was 'plausible and consistent with innocence',

United States v. Barnes,
412 U.S. 837 (1972)

is not reached and not satisfied.*

The Supreme Court in Barnes, supra, held that even if an inference charge is not barred under the facts of a case, it must still meet the two standards, namely, "more likely than not", and "reasonable doubt", before it can be given. In that case the inference charge went only so far as to allow a jury to conclude from "possession of recently stolen property" that the defendant had "knowledge" that the property was stolen. In the case at bar the inference charge went much much farther and allowed the jury to conclude from possession of 'bait money'

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* See, Tot v. United States, 319 U.S. 463, 470 (1943).

that the bait money was "stolen" and that defendant stole it in the bank robbery and thus that he was the bank robber (524-525).

In Bollenbach v. United States, 326 U.S. 607, the Supreme Court disparaged and rejected a charge to the jury that allowed the jury to infer from possession of recently stolen property(which fact was undisputed there) that that defendant was the thief.

The Supreme Court ruled in Bollenbach, supra, at p. 611, that the

> "Government does not defend the 'presumption' as a fair summary of experience. It offends reason, so the Government admits, as much as did the presumption which was found unsupportable in Tot v. United States, 319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519, even though that was embodied in an Act of Congress."

The holding in that case has not been diminished by Barnes, nor overruled. The trial court's charge in this case was plain error.

POINT II

The Government concedes error in the trial court's charge

The Government in its brief at pages 8 and 9 concedes error in the charge by the trial court, to wit:

> "The Government concedes that the Judge did not, in this sequence, mention appellant's defense that the bait money was stolen."

The Government at page 9 of its brief while attempting to explain the effect of the trial court's error, actually

quoted the charge which had declared that the "bait money" was 'recently stolen', to wit:

> ". . .'I will later charge you on an inference which you may draw from possession of recently stolen property, which, in this case, was the bait money'. . . /emphasis supplied/ (502-503)".

The Government contends in its brief at page 8 that the trial court

> "made it clear to the jury that in order to convict the defendant it had to decide that the bait money found in the possession of appellant was stolen."

This orphaned statement by the trial court was overwhelmed by the weight of the trial court's repeated charge that made "bait money" synonymous with "recently stolen property" to the jury.

In addition to the matters called to the Court's attention in the defendant's brief, it is respectfully noted that when the jury sent out a note to the trial court which showed that they were confused and which asked the trial court to instruct them on "how to reach a verdict or what we should base our verdict on,..." to wit:

> "Can you charge -- instruct us again tomorrow on how to reach the verdict, or what we should base our verdict on and find out if everyone understands." (560-561),

the trial court responded by stating the following to the jury:

"Now, my charge I think took about an hour and a half, an hour and a quarter. I do not think you want me to charge on everything that I charged on today. When you get in tomorrow, if you can give me the subject matter, and I will again remind you on the various subject matters of my charge. I will give it to you something like, 'all the participants in the charge, the function of each in a jury trial, the charge on presumption of innocence, the charge on reasonable doubt, the obligation of the jury to weigh the credibility of every witness, the charge on inferences and presumptions, what inferences you may make if you wish on recent -- progression*of recently stolen property, what inferences you may make if you find that the defendant made a statement--an exculpatory statement which was later shown to be false, all the elements of each crime charged in the indictment, the reading of the statutes upon which the indictment is based, your duty to deliberate and how you arrive at a verdict,' and that would be about it. I am trying to recall the different subject matters. If you pick the particular subject matter and you want me to recharge it, I will be glad to do it."

The trial court again unmistakably instructed the jury that the bait money was stolen property and that the alleged "statement" which the defendant made at the police station was an exculpatory statement, and more, that it was "later shown to be false". (561) That instruction to the jury was the last thing the jury heard when it was excused for the night (562). It is eminently fair to state that the jury went home with those instructions ringing in their minds as a clear direction of the trial court on the vital issues of the trial.

The trial court, while stating that Detective and Agent Sweeney had testified that the defendant had made a statement regarding the source of some $515.00 in bills as

* This was apparently a typographical error in the original transcript. It should read : "possession".

being Richard Cocciardo, (507-511) did not state that the defendant had testified that he did not make that statement and that he was merely told by the police to be present when the statement was made by police (294-295; 346).7

The plain error of the trial court was carried forward again to the jury by the trial court's additional charge set forth at pp. 573-577. At page 574 the trial court gave the jury the instruction on "inference" on the basis that the jury was "not required to draw any conclusions from that circumstance", (underscoring added) namely that "the defendant concedes that he was in exclusive possession of the bait money on March 4, 1974". The trial court erroneously instructed the jury that it was "not required to draw any conclusions from that circumstance", leaving the jury to understand that in other instances where the inference charge was given that they were "required" to make the inference. This instruction served again to smother the defense. It also served to heighten the impact of the 'requirement' of the jury to draw the inferences stated by the trial court from "recently stolen property" that the defendant was the thief or robber, and from false 'exculpatory' statements by the defendant of "possession of the bait money" that the defendant was the thief or robber.

The trial court left no room for the defense by its further instruction

> "...but you are permitted to infer from the defendant's unexplained or unsatisfactorily explained possession or false explanation of possession of the bait money, and in the light of the surrounding cir-

cumstances as shown by the evidence, that the defendant was the thief and/or robber.

In determining the strength of the inference that you may make, take into consideration the time lapse between the robbery and defendant's possession of the bait money. Obviously, if he had come into possession of the money on the day of the robbery, the inference would be stronger than if he would have come into possession of the money one month after the robbery.

Neither of these events happened but I use that as an example to show you the strength of the inference depends - when we talk about recent possession - depends on the time lapse and all the other surrounding circumstances. In determining when he came into possession of the money, take into consideration all the testimony in the entire case, and in considering the inferences, take all the testimony of all the witnesses into consideration..." (574-575). (Underscoring added)

The trial court identified the bait money as being stolen property and instructed the jury that it could infer from the mere possession of the bait money and from "the defendant's unexplained or unsatisfactorily explained possession or false explanation of possession of the bait money, and in the light of the surrounding circumstances as shown by the evidence, that the defendant was the thief and/or robber." That was a directed verdict of guilty.

The trial court's instruction was not valid either in logic or in law. The mere possession of the bait money by the defendant does not prove that the bait money was stolen, or that the defendant was the thief and/or robber.

United States v. Barnes,
412 U.S. 837 (1973);

Bollenbach v. United States,
326 U.S. 607 (1946);

Tot v. United States,
319 U.S. 463 (1943).

At page 8 of its brief, the Government attributes to this "false explanation" theory only that it authorized the trial court to charge the jury that this could 'imply' "that appellant recognized his own guilt" (of what?). The Government could not bring itself to support the trial court's charge.

The Supreme Court in Bollenbach v. United States, 326 U.S. 607, 612 - 615 (1946) held:

> "Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy...A conviction ought not to rest on an equivocal direction to the jury on a basic issue...A charge should not be misleading. See, Agnew v. United States, 165 U.S. 36, 52, 17 S. Ct. 235, 241, 41 L. Ed. 624. Legal presumptions involve subtle conceptions to which not even judges always bring clear understanding ....In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."

The trial court's instructions to the jury were "simply wrong" and deprived the defendant of a fair trial by jury in accordance to due process of law.

It was seriously important that when the jury requested further instruction (560-561) , that the trial court should

'correctly and concretely instruct the jury as to the applicable law to guide them through the maze of the trial.'

Bollenbach v. United States,
326 U.S. 607, 612-615 (1946).

The trial court instead of doing so, gave wrong instructions to the jury on the vital issue before the jury. The effect on the jury of this end of the other instructions by the trial court that the bait money was stolen was clear: they convicted the defendant of the second count [18 U.S.C. Sec. 2113(a)], but they acquitted the defendant of the first count, notwithstanding that the testimony of the tellers was that the bank robber pointed a gun at them and told them he would kill them (28, 82, 94).

United States v. Marshall,
427 F. 2d 434 (2d Cir, 1970).

The trial court had explicitly instructed the jury, after he had rendered the inference instructions:

> "Now, in making this inference from possession of recently stolen money, you may not infer that the defendant placed lives in jeopardy. You may only infer that he robbed the bank. That does not include the other inference. Other evidence in the case would be necessary to support the elements in the graver crime, which again, I point out is only found in Count I.
>
> The defendant's possession of recently stolen property does not shift the burden of proof...."(523).

The exclusion by the trial court of the first count from the inference instruction effect demonstrates the controlling effect of the inference instructions on the verdict rendered.

The trial court, as noted in the main brief had instructed the jury that the inference was sufficient to convict the defendant as the bank robber (524-525):

> "The Government does not have to prove by separate independent evidence, aside from the benefit of that inference, that he was the robber. That inference from recently stolen bait money, would support the elements of the crime charged, except the one element that you find only in Count 1,to wit, that defendant placed in jeopardy lives of employees or other persons." (524-525).

As stated in the main brief, the trial court's charge whittled the defense into an 'explanation' by the defendant for the 'possession of recently stolen property'. (507-511; 524-526) The trial court's charge precluded the jury from considering the defense except as an 'explanation for possession of recently stolen property' (526). Since the trial court's charge had made "bait money" appear to be synonymous with "recently stolen property", the effect of the charge was to convict the defendant of bank robbery upon proof only of the admitted fact that he possessed money whose serial numbers appeared on the bank's records as of December 19, 1973, some two months prior to the bank robbery at about 2:00 p.m. on February 25, 1974. (524-525).

The fact that defendant possessed the bait money clearly is not sufficient to prove all of the essential elements of the crime of bank robbery in any of the variations charged in the indictment under 18 U.S.C. Section 2113 (d)(a)(b). That inference charge instructed the jury to convict this defendant without the "proof beyond a reasonable doubt of every

fact necessary to constitute the crime..." in violation of the Due Process Clause.

In re Winship,
397 U.S. 358,364 (1970).

POINT III

There was no legal evidence that the 'bait money' was in the bank at the time of the robbery

The defendant respectfully urges that there was no legal evidence to prove that the 'bait money' was in the bank at 2:00 p.m. on February 25, 1974, and that the absence of proof of this vital element requires the reversal of the judgment and dismissal of the indictment.

Vachon v. New Hampshire,
414 U.S. 478 (1974);

Harris v. United States
404 U.S. 1232 (per Douglas, J., in chambers,1971);

United States v. Schneiderman,
106 F. Supp. 906 (D.C. Cal. 1952);

Thompson v. City of Louisville,
362 U.S. 199, 80 ALR 2d 1356 1367, 1368 (1960);

Tot v. United States,
319 U.S. 463 (1943).

As stated in the appellany-defendant's brief at pp. 21,22, the only testimony in the record was the improper and incompetent hearsay statement of Angela Crimi (39) (Point II, Main Brief),

United States v. Borelli,
336 F.2d 376,392 (2dCir.,1964);

2 Wigmore, Evidence (McNaughton Ed.) Sec. 657;

McCormick, Evidence, Section 10 (1954);

See, Fahy v. Connecticut,
375 U.S. 85,86,87(1963);

and would be plain error even if it had not been objected to.

Naples v. United States,
344 F.2d 508,
120 U.S.App.D.C. 123,
mot. den. 359 F.2d 276,
123 U.S.App.D.C. 292 (C.A.D.C.,1964);

United States v. Dunn,
299 F.2d 548, 554,555 (4th Cir., 1962).

Whether the bait money was in Angela Crimi's cash drawer at the bank at 2:00 p.m. on February 25,

1974 or whether it was not was a matter of observable fact. The trial testimony shows that Angela Crimi did not make any observations as to this essential fact.

> The common law system of proof is exacting in its insistence upon the most reliable sources of information. This policy is apparent in the Opinion rule, the Harsay Rule and the Documentary Originals rule. One of the earliest and most pervasive manifestation of this attitude is the rule requiring a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe and must actually have observed the fact. /Barnett v. Aetna Life Ins. Co., 139 F. 2d 483, syl. 3. (C.C.A. N.J. 1943)../7."
>
> McCormick on Evidence, Section 10 (1954)

The Government argues at page 7 of its brief that the fact whether the bait money was in Angela Crimi's drawer at the time of the bank robbery can be shown by resort to "business custom or practice." This fact issue simply does not lend itself to proof by that means.

The Government argues at page 7 of its brief that the 'bait money' was in Angela Crimi's drawer at the time of the bank robbery at 2:00 p.m. on February 25, 1974, as shown by testimony as "business practice or custom".

This fact issue simply does not lend itself to proof by "business practice or custom". This fact issue is not a procedure that is involved; it is an objective physical observable fact; either it was observed, or it was not observed, to be in the cash drawer of Angela Crimi at 2:00 p.m. on February 25, 1974. "Business practice, or custom" testimony cannot establish this fact, not only because there was no sufficient testimony to show that this fact was a subject of "business practice or custom", since the last time the bait money was allegedly observed physically as the bank records showed, was December 19, 1973(45), but also because Angela Crimi testified that she 'gave out' that 'bait money' on February 25, 1974. (40,41).

The cases relied by the Government in their attempt on this appeal to argue the existence of the 'bait money' in Angela Crimi's drawer at the time of the robbery by resort to the theory of "business practice or custom", are neither appropriate, nor supportive of the Government's Appeal arguments. The cases cited by the Government involved a proof of a procedure of immigration officers "invariably" to cause an immigration applicant to be sworn before answering the questions on the immigration form which are written by both the applicant and the immigration officer. In the Oddo case (314 F. 2d 115, 117) "the existence of certain check marks and initials on Oddo's preliminary form indicated that both examiners, having

placed Oddo under oath, had orally asked him each question on the form, including Question 29 and received the same answer as the one that he had given in writing. Testimony as to custom and practice is admissible as circumstantial evidence, subject to the usual condition that its probative value outweigh any possible prejudicial impact."

While the Government now argues on appeal about "business practice or custom", the Government on the trial failed to prove that the physical existence of the 'bait money' in Angela Crimi's drawer was provable by way of 'business practice or custom' or that there was any 'business practice or custom' as to the bait money other than the apparently irregular recorded notes(41-45). No evidence was adduced to show that the 'bait money' was handled any differently than other bank money on a basis sufficiently reliable and regular and frequent (viz, "invariably", all the time) to be able to show from the proof of the "practice" the existence of the bait money in Crimi's drawer at the time of the robbery. Even if there were such a practice - which there was not - it could not establish that the bait money was taken by the bank robber since after the robbery there was a time lapse of some five minutes when Crimi had not looked into the cash drawer and other strangers were in the bank and in and about that cash drawer(32-34). Crimi did not observe *

In the case at bar there was an insufficient factual basis to argue the existence of a custom or business practice in regard to the bait money or to prove the existence of the 'bait' money' in Angela Crimi's drawer after December 19, 1973 at the time of the alleged physical observation of the bait money.

* what was in her cash drawer either before, during, or after the robbery. (27-34).

The challenged testimony of Angela Crimi was allowed following her response to a question as to the denominations of the bills that she had in her drawer on February 25, 1974. The challenged testimony itself showed that Angela Crimi did not know what money she had in cash in her drawer; this challenged testimony cast doubt on her prior testimony in which she had recited the denominations of bills she claimed to have had in her cash drawer. It is fair to state that her testimony as to which denominations she had in her cash drawer was merely a recitation of the common bill denominations she ordinarily handled, as distinct from what she actually knew by observation of what she had in her cash drawer.

POINT IV

The alleged "consent" by Mrs. Klein was coerced.

The Government asserts in its brief at Point II that "the consent search was proper."

A review of the suppression hearing transcript and of the trial testimony of Mrs. Klein shows that the so-called "consent" to search was the result of the statements and acts of Special Agent McMullen and Suffolk County Police Detectives which were false and coercive and which overbore the will of Mrs. Klein.

Schneckloth v. Bustamonte,
412 U.S. 218 (1973);

Culombe v. Connecticut,
367 U.S. 568, 604, 605 (1960);

Amos v. United States,
255 U.S. 314 (1920);

Gouled v. United States,
255 U.S. 301 (1920);

Bantam Books, Inc. v. Sullivan,
372 U.S. 58, 68 (1962).

It is respectfully submitted that in the light of all the circumstances of this case that the alleged "consent" was a submission to authority and was not voluntarily given by Mrs. Klein,

Schneckloth v. Bustamonte,
412 U.S. 218 (1973),

and it was the result of false statement by the police to Mrs. Klein that their purpose in making the search was to help the defendant who was then in jail, away from the house. (H35)

Amos v. United States,
255 U.S. 314 (1920);

Gouled v. United States,
255 U.S. 301 (1920).

The Government does not claim that there were any exigent circumstances involved in calling upon Mrs. Klein at her home at No. 9 John Street. The defendant had been arrested at his place of business and was then confined at the Suffolk County Police Headquarters. No claim was made by the Government that Mrs. Klein, or anyone else would destroy or remove any evidence. The total absence of any exigent cir-

cumstances is finally established by the fact that not less than two days elapsed from the date of the visit by the officers to Mrs. Klein and the application by the Suffolk County Police Detective for a search warrant and the total failure of any federal officers to seek any search warrant at all.

The officers came to #9 John Street at about 8 - 9 p.m. on March 4, 1974. Mrs. Klein was alone; she was told that the defendant was in jail charged with bank robbery; Mrs. Klein testified that she was upset and by the time that the officers were in the garage her "knees were shaking" (H 38). She testified that the officers told her that if she refused to allow them to go into the garage to search "they would come back with a search warrant" (H 35). She testified that they told her that "if I would cooperate that things would look better for Frank" (H 35). The officers did not tell Mrs. Klein the truth. They concealed from Mrs. Klein their true purpose in entering the garage which was to seek to inculpate the defendant, rather than what they told Mrs. Klein, that they were trying to help the defendant and that their search of the garage would help the defendant; they knew that this was not true, and that the opposite was true. While it may be argued that the officers did not have to disclose their purpose for the warrantless search /But see, New York Criminal Procedure Law, Section 690.25/having stated their purpose, they were obliged to speak the truth. The so-called "consent" was given by Mrs. Klein based on all the circumstances with which she was faced. It cannot properly be said that the "consent" based on false

representation was "knowingly and wilfully" given, nor that it was voluntary.

The Supreme Court in Gouled v. United States, 255 U.S. 301, 305-306 (1920) held that obtaining admission to a man's house by

> "stealth instead of by force...could be as much against his will in the one case as in the other; and it must therefore be regarded as equally in violation of his constitutional rights."

To obtain admission to a man's house by deceit perpetrated by law enforcement officers of this Government is a violation of the defendant's and Mrs. Klein's constitutional rights. Additionally, the circumstances whereby the officers, representing police authority, came to Mrs. Klein's home at night, while she was alone and while the defendant was absent in jail charged with bank robbery, and informed her that unless she allowed them to enter the garage they would return with a search warrant, and the circumstances that Mrs. Klein was upset and 'her knees were shaking', establish that the alleged "consent" was not voluntary, but coerced.

Amos v. United States,
255 U.S. 314 (1920);

Gouled v. United States,
255 U.S. 301, 305, 306 (1920).

It is notable that the trial court showed that it believed that the officers had not testified truthfully (H 75). It is also notable that the trial court found "no consent"

in regard to the search of the car in the garage (H 70). The trial court's reasons were that the car was

> "not her car. She did not have the use of it. There is nothing in the record that shows she had the right to use it and if she had the right, I doubt that would have included - I don't know that would have given anyone else the right to search. No." (H 70).

By analogy, the coat which was seized by the officers in this warrantless search was not Mrs. Klein's coat and there was no testimony to show that she had a right to use it; on the contrary, Mrs. Klein testified that she had no such rights and that "his belongings were his belongings and mine were mine." (H 45). Therefore as to that coat by analogy Mrs. Klein had no right to consent and did not consent to any 'search' of the coat, and certainly she did not and by analogy of the trial court's ruling, could not, consent to its <u>seizure</u>.

The so-called "consent" was found by the trial court to be a "consent to a limited search in the garage." The trial court however did not state any description of the limits of that 'search', either as to extent or as to scope, or as to purpose.

The trial court ruled:

> "I find that the owner of the house, Carolyn Klein, knowingly and wilfully waived her right against unreasonable search and seizure and gave consent to a limited search in the garage and the Government proved that by proof beyond a reasonable doubt.
>
> That search revealed a raincoat which the Government seized. All that the defendant

> Valcarcel had was license to enter the garage, the place where the coat was part of the premises occupied by the owner, Carolyn Klein, and I find that one coat was in full view and subject to seizure." (H 68).

The Government's position apparently is that the officers were lawfully in the garage and upon seeing the coat they were authorized to seize it under the "plain view" doctrine described in Coolidge v. New Hampshire 403, U.S. 443 (1971).

It is respectfully submitted that the "plain view" doctrine has no application to the facts in this case because the warrantless intrusion by the officers was not consented to, was specifically made to search for evidence from the clothing of the defendant (H47) and the coat was not "immediately apparent to the police that they have evidence before them."

> Coolidge v. New Hampshire,
> 403 U.S. 443 (1971).

Agent McMullen testified as follows as to his conversation with Mrs. Klein:

> I asked Mrs. Carolyn Klein if Mr. Patrick Valcarcel had any place in her house in which he stored personal belongings. She stated that he had some clothing which she kept in the garage or was hanging in the garage. I told her that I didn't have a search warrant and that I would like her consent to look through his clothing and that I would stop - if I was granted consent - I would stop at any time upon her request. She stated 'okay' and she took me to the garage, showed me where it was and what was hanging in the garage." (H47, 48)

This testimony shows that this warrantless search was directed against this defendant in a general search for evidence and that the officer's search was directed at defendant's clothing. There was nothing 'inadvertent' about this search as to the coat. Additionally, the coat was not "immediately apparent to the police that they have evidence before them" (Coolidge v. New Hampshire, supra, at p. 466) as shown by the testimony of Agent Warkenthein:

> "Once inside the garage I also observed some clothing, men's clothing which comprised of pants, two trench coats, one black and white, hanging on an overhead runner of the garage door on the opposite side of the garage. Agent McMullen inquired if the clothing belonged to Mr. Valcarcel and Mrs. Klein said it did..." (H 61).

Agent McMullen had to make inquiries as to whom the clothing belonged before he could even conclude that the "items of apparel...(were) possibly ... used in the bank robbery" (#48).

See, United States v. Gray,
484 F. 2d 352, 355 (1973).

The "plain view" doctrine allows seizure of an item of contraband or evidence provided certain conditions are met:

> "What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification - whether it be a warrant for another object, hot pursuit, search incidental to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused - and permits warrantless seizure. Of course, the

extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; that 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." (Underscoring added).

Coolidge v. New Hampshire,
403 U.S. 443, 466 1971).

Even if the "plain view" doctrine was applicable to this case, still there were no exigent circumstances justifying a seizure of the coat without a warrant.

McDonald v. United States,
335 U.S. 451 (1948);

Trupiano v. United States,
334 U.S. 699 (1948).

It is also important to note that the alleged "consent" requested by the police from Mrs. Klein and the consent allegedly given by Mrs. Klein to the police was only a narrowly limited one:

"...to look through his clothing..." (H 47, 48).

No consent was sought or was given to seize any of the clothing of the defendant that the officer 'looked through'. Since constitutional rights are involved, the consent, or stipulation should not be extended beyond its actual terms. The seizure was unlawful.

See, Pereira v. Pereira,
35 N.Y. 2d 301, 307 (1974)

POINT V

The gloves and scarf are the product of a warrantless and unreasonable search and seizure.

The search warrant was a state search warrant directed to state officers for execution and executed by state officers.

The presence of the federal offifers was not covered by the state search warrant. The seizure of the gloves and the scarf by federal officers within the confines of the locked and separate room and quarters of the defendant who was neither named nor described in the state search warrant, nor was his room or quarters named or described in the search warrant, was a warrantless and unreasonable search and seizure.

Marron v. United States,
275 U.S. 192 (1927).

Stanley v. Georgia,
394 U.S. 557 (1969).

The affidavit cannot expand the scope and terms of the warrant.

United States v. Kaye,
432 F. 2d 647 (C.A.D.C., 1970)

These items, the gloves and the scarf, were not listed on the state return by the state officers to the state search warrant. These items were searched for and seized by federal officers acting without any search warrant authority, and without any claim of exigent circumstances, or any other exception to a search warrant requirement. As noted above, the state search warrant was obtained two days after the initial visit

to Mrs. Klein's home by Agent McMullen and Detective Warkenthien. The federal officers had plenty of time to obtain a warrant to search for and to seize the gloves and scarf and to enter the locked private quarters of defendant in the building owned by Mrs. Klein. The gloves and scarf should have been suppressed.

CONCLUSION

The judgment of conviction should be reversed and the indictment dismissed.

The Government failed to prove that the 'bait money' was in the cash drawer of Angela Crimi at the time of the robbery and there is no legal evidence in the record to show that it was there. The Government failed to establish this fact by evidence in chief, or even on rebuttal.

The record shows that no one had made any observation to establish the existence of the bait money as being in the bank prior to the time of the bank robbery. The record also shows that after the bank robbery that bank personnel, including Angela Crimi did not make a physical check of the Crimi cash drawer to observe its physical condition and to observe the presence or absence of any money, until not less than five minutes after the police (and others?) had arrived during which interval the bank personnel were outside of the bank and unknown others were inside of the bank. Upon a reversal, it is fair and proper to state that this void and

absence of evidence would, or could be easily filled in by the benefit of hindsight. The Government has already had its chance to prove that fact. It failed to do so. It was essential to its case in chief, it was focused on by the defense; the Government did not provide any evidence of this fact even on rebuttal It would be unfair to permit the Government to have the opportunity to fill in this void at a retrial.

People v. Hendricks,
25 N.Y.2d 129 (1969).

RESPECTFULLY SUBMITTED,
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